SUPREME COURT, U. S.

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No. 173

In the
Supreme Court of the United States
OCTOBER TERM, 1968

RICHARD E. GORMAN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Richard E. Gorman, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the United States District for the Northern District of Illinois, Eastern Division, in Case Number 66 CR 133 was entered on October 14, 1966, and is not reported, but appears in the record filed with and

certified by the Clerk of the Court of Appeals for the Seventh Circuit to this Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed April 5, 1968, and is not yet reported, but is set forth in the Appendix hereto and in the certified copy of the record as number 16018 as of that date.

JURISDICTION

The date of the judgment to be reviewed is April 5, 1968. A petition for rehearing en banc or in the alternative by the panel of judges hearing the matter in the Court of Appeals for the Seventh Circuit was denied May 9, 1968. This petition is filed within 30 days of that order. The jurisdiction of this court is invoked under 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Should not a standard of mental capacity be defined for the guidance of United States Courts and litigants?

2. Was not the petitioner's right to a fair trial under the Sixth Amendment to the Constitution denied when the Court of Appeals held it was not reversible error for the trial court to refuse to charge the jury as requested on the petitioner's theory of defense, which was the lack of mental capacity to commit the crime charged?

3. When the trial court recognized and stated that "some considerable evidence" relating to the defendant's mental condition had been introduced, and yet refused defendant's properly submitted ALI insanity instruction, did not the Court of Appeals, to justify affirmance, err

in reassessing the quantum and quality of evidence of mental incapacity to commit the crime, in order to reach a finding *de novo* that the issue of insanity was not raised by "some evidence."

4. When the issue of mental incapacity to commit a crime was raised by the defense, was not the petitioner entitled to a directed verdict when the government presented no rebuttal, and no proof of mental capacity to commit the crimes charges beyond reasonable doubt?

5. Did not the Court of Appeals err in its opinion in holding that venue for this prosecution was properly laid and proved in the Northern District of Illinois, when neither the President of the United States nor his delegate, the Secretary of the Treasury has established any Internal Revenue Districts under Section 7621 of Title 26, U.S.C.?

6. Does the decision of the Court of Appeals fixing venue constitute legislation by judicial fiat?

STATUTES INVOLVED

Title 26, United States Code.

§7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties

provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with costs of prosecution. Aug. 16 1954, c. 736, 68A Stat. 851.

26 U.S.C. §7621. Internal revenue districts.

(a) Establishment and alteration. The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The president may from time to time alter such districts.

(b) Boundaries. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district.

STATEMENT OF THE CASE

This case involves a judgment of conviction on a five count indictment, charging in the first count that the defendant, a resident of the County of Cook, State of Illinois, had received a gross income of $43,629.12 during the calendar year 1959 and failed to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Chicago, at Chicago, Illinois, on or before April 15, 1960, and that the said failure to make such return was wilful, in violation of Section 7203, Internal Revenue Code, Section 7203, Title 26, United States Code.

Count II charged the defendant with the receipt of a gross income of $28,072.60, during the calendar year 1960 and with the wilful failure to make on or before April 15, 1961, a tax return as aforesaid.

Count III charged the defendant with having received a gross income of $20,753.57 during the calendar year

1961 and with having wilfully failed to make an income tax return before April 15, 1962, as aforesaid.

Count IV charged the defendant with having received a gross income of $11,775,00 during the calendar year of 1962, during the calendar year 1962 and with having wilfully failed to make an income tax return on or before April 15, 1963, as aforesaid.

Count V charged the defendant with having received a gross income of $38,940.00 during the calendar year 1963 and with having wilfully failed to make an income tax return on or before April 15, 1964, as aforesaid.

The case was tried to the court, sitting with a jury beginning September 19, 1966, through September 27, 1966, upon which date a verdict of guilty as charged was returned as to all counts. Judgment on the verdict was entered on October 14, 1966, and the defendant was sentenced to the custody of the Attorney General for a period of one year on each of Counts I, II, and III, sentences to run concurrently as to each of the said counts and to the custody of the Attorney General for a period of one year on Count IV to run consecutive to the sentences on Counts I, II, and III, and to the custody of the Attorney General for a period of one year on Count V, to run consecutive to the sentence on Count IV, or a total of three (3) years.

In the appeal to which certiorari is sought, your petitioner complained of errors arising out of erroneous rulings by the trial court which deprived him of his constitutional right to defend himself; in the court's instructions and refusal to instruct the jury, as to his theory of the case particularly concerning his mental capacity to commit the crime and the government's failure to meet its burden of proof on the question of (a) mental capacity to commit the crime, and (b) venue.

STATEMENT OF FACTS

Opening statements were made by counsel for the government and for the petitioner, (A. 11) outlining the theory of the case of the respective parties. In this statement of facts concerning the evidence, all differences, on which reasonable minds apparently could disagree have been deleted. What is stated here is what the petitioner believes adequately covers the matters pertinent to this petition for Certiorari.

THE EVIDENCE RE VENUE

A. FOR THE GOVERNMENT.

Personnel of the Internal Revenue Service testified that a search of the records maintained in Chicago, Illinois, had been made seeking tax returns submitted by the petitioner for the years 1959 through 1963, and that none were found. (A. 14-17)

During cross-examination one of these witnesses Rose Chowaneck testified (A. 17) that a person who lives in Chicago or in a suburb must file their returns in the Chicago District, and that the basis for this answer is an instruction in the supplement to the Internal Revenue Manual which is a large book and is available only to persons working for the Internal Revenue Service.

An employee in the Regional Counsel's Office of the Internal Revenue Service testified (A. 18) to computations that he made of the petitioner's gross income for the years 1959 through 1963.

On cross-examination (A. 30, 31) this witness testified that when a person lives in the Chicago area or in the County of Cook, or works in Cook County his income tax returns are to be filed with the District Director of the

Chicago District. He stated that the legal source of that statement as to when the returns were to be filed was *in his opinion* contained in the Code and Regulations of the Internal Revenue Service, but no specific answer was forthcoming.

FOR THE DEFENSE.

The petitioner testified and and admitted not filing his tax returns for the years in question, and that during those years he resided in Oak Park, Illinois, a suburb of Chicago and maintained his law practice in downtown Chicago.

Both at the conclusion of the Government's case and at the close of all evidence, as well as after verdict, your petitioner moved for judgment of acquittal for, *inter alia,* failure to prove venue on the ground that no internal revenue districts have been established pursuant to the direction by the Congress to the Executive as contained in Section 7621 of the Internal Revenue Code of 1954.

That the failure to establish venue was well recognized as a major issue in the lawsuit is clear. In the colloquy on instructions, it was again enunciated:

> "Mr. Calihan, (defense counsel): The only objection that I would have to that one is that it does not state the requirement of venue in the sense—this is part of our defense here, that there is no district established.
>
> "Mr. Schultz (Assistant United States Attorney): Your objection, as I understand it, is to a question of law now as to whether or not districts have been formed, and this is a question for the jury." (Tr. 903)

On Appeal, the Seventh Circuit held:

> "Section 6091 of the Internal Revenue Code of 1954 (26 U.S.C. § 6091) requires individuals to file

their income tax returns in the internal revenue district of their legal residence or place of business. Defendant contends that there is no venue on the ground that neither the President nor his delegate, the Secretary of the Treasury, has established any internal revenue districts under Section 7621 of said Code (26 U.S.C. § 7621), which provides:

> § 7621. Internal revenue districts.
>
> '(a) Establishment and alteration.—The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.
>
> '(b) Boundaries.—For the purpose mentioned in subsection (a), The President may subdivide any State, Territory, or the District of Columbia, or may unite into one district two or more States or a Territory and one or more States.'

"This contention ignores Section 7851 (b) (2) of the Code (26 U.S.C. § 7851 (b) (2)), which provides:

> '§ 7851. Applicability of Revenue Laws.
>
> • • •
>
> '(b) Effect of Repeal of Internal Revenue Code of 1939.—
>
> '(2) Existing offices.—The repeal of any provision of the Internal Revenue Code of 1939 shall not abolish, terminate, or otherwise change—
>
> '(A) *any internal revenue district.*' (Emphasis supplied.)

"In 1946 the Secretary of the Treasury divided Illinois into two collection districts, with Cook County, in which Chicago and Oak Park are situated, in the First District (11 F.R. 177A, p. 28). Except for changes in nomenclature, Illinois has subsequently retained the same two collection

districts. Inasmuch as Chicago and Oak Park are in the First Collection District (now entitled "District Director, Internal Revenue Service, Chicago, Illinois"), venue was properly laid in the Northern District of Illinois. To hold otherwise would mean that no one could be prosecuted for failure to file tax returns anywhere in the United States. Congress intended no such ludicrous result." (Op. 16018, A. 7a-8a)

THE EVIDENCE RE MENTAL CAPACITY

A. FOR THE GOVERNMENT.

This evidence was adduced on the government's case-in-chief. There was no evidence in rebuttal.

The records of the Internal Revenue Service showed petitioner had filed his income tax returns through the taxable year 1958.

An agent of the Internal Revenue Service assigned to the Intelligence Division at Chicago, testified that, in a conference had on October 15, 1965, in the presence of his group supervisor, your petitioner appeared with an attorney (A. 35) and that it was represented to the Internal Revenue Service that your petitioner had been accused of subornation of a juror in a federal district trial in which he had participated in mid-1959 and in the summer of 1960 he had been indicted on that charge, and that the case went to trial in December of 1962 and your petitioner was found not guilty. It was also stated that as a result of the investigation and subsequent indictment for subornation of a juror, your petitioner had been incapable because of mental stress to handle his affairs and responsibilities. He further testified that your petitioner stated at that conference that he did not know

during this period if he realized any of his responsibilities and that he had been admitted to the Sacred Heart Sanitarium in Milwaukee and had availed himself of the services of a leading psychiatrist in Chicago.

B. FOR THE DEFENSE.

Your petitioner, an attorney, testified in his own behalf (A. 40). Your Petitioner testified that prior to the summer of 1959 he had been a regular taxpayer. That it came to his attention during that summer that one Gerald Covelli, was giving statements to the Department of Justice accusing your petitioner of having participated in subornation of a juror in a case that the petitioner had represented him as an attorney. Your petitioner testified concerning discussing the matter with personnel of the United States Attorney's office in Chicago and appearing before the Grand Jury investigating the matter on at least two occasions at his own request in an effort to forestall an indictment. Your petitioner testified that in June 1960 he was indicted and that this indictment pended until December of 1962, when after trial he was acquitted. Your petitioner testified further, among other things, concerning the effect of this indictment on him personally and to his practice and stated that he was greatly distressed because the prosecution had seen fit to indict him on the word of a man whom they knew to have no regard for the truth. He further testified concerning seeking psychiatric help and to the deterioration of his physical condition during this period of time. Because of the length of this testimony and its importance relative to this petition, and since it is completely set forth in the appendix, the petitioner respectfully requests that the court read it in its entirety.

A personal physician (A. 82) testified that during this period of time your petitioner developed a serious hyper-

tension which could be caused by an emotional and anxiety state. He gave a complete résumé of the petitioner's physical deterioration which resulted in his being admitted to the hospital in April of 1964 as critically ill. (A. 84)

Four attorneys (A. 95, 96, 97, 98) testified as character witnesses for the petitioner and also described their observations of him prior to and during the period 1959 through 1963, and to the marked changes in him during this period relative to appearance, demeanor, and habits, and an apparent diminution in legal acumen and awareness.

Your petitioner's wife testified to his history prior to the return of the indictment against him for subornation of a juror, as a husband, father, and son. She testified to her efforts to have him seek out and avail himself of medical treatment and psychiatric help during the pertinent period. (A. 108-111)

A qualified psychiatrist, (App. 114) testified that the petitioner had a classifiable, recognized, psychiatric illness, including the basic elements for a diagnosis for a psychoneurotic reaction, depressive type; that the symptoms were confusion and helplessness and an attitude that life was useless and that "nothing counts" to the point of disassociation with moral standards and moral codes; that among the responses normal to his condition as diagnosed are depression, psychosomatic problems, particularly a frequent occurrence of high blood pressure or hypertension; that there was temporary brain damage in the defendant caused by hypertension and the brain damage provoked emotional instability and a moral deterioration; that this condition prevents the man from carrying forth the norms, customs, obligations, and re-

sponsibilities incumbent upon a citizen of the community. (A. 121-124)

As stated before, the Government presented no rebuttal.

The defense requested an instruction be given to the jury, which instruction was:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

The instruction was refused, and so far as mental capacity is concerned, the trial court instructed as follows:

> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963."

In its opinion, the Seventh Circuit Court of Appeals ignored the evidence detailed above, and synopsized the incapacity defense merely as follows:

> "During the summer of 1959 defendant was accused of subornation of a juror in the January 1959 criminal trial of his client, Gerald Covelli. Your petitioner's defense in this action was that the resulting mental stress caused him to neglect filing the tax returns in question. His indictment for subornation of a juror occurred in June 1960. He was acquitted of that offense in December 1962.

"In response to a hypothetical question, psychiatrist Dr. Marvin Ziporyn testified that defendant had 'a psychoneurotic reaction, depressive type,' but that his ability to reason logically was unimpaired. Dr. Ziporyn also testified that such a psychoneurotic 'is aware of reality,' and that defendant 'knew right from wrong' and was not psychotic. He described Gorman's condition as 'not uncommon.'" (Op. 16018 A. 1a-2a)

The Court of Appeals also characterized the theory of defense as "lack of wilfulness, not insanity . . .", though the record clearly shows that throughout the trial the defense of mental instability was clearly and repeatedly adverted to. A few of these occasions are:

Opening Statement:

"He neglected the most basic elements of just self-preservation . . . he eventually had to seek help, seek help with his health; his family got him to seek psychiatric help; sent him to a sanitarium; . . . experiences like that just don't go away over night . . . This . . . is what the evidence will show happened to a man, a sensitive man, who is prosecuted wrongfully."

Government witness Kelly on direct:

"Mr. Irish said to Mr. Gorman that since he had filed income tax returns prior to 1959 that he knew his responsibility of filing these returns. Mr. Gorman replied that this was not necessarily the truth because at the time, the case against him was pending he did not know if he realized any responsibilities." (A. 37)

Defense counsel:

". . . [t]his happens to be a case involving state of mind." (A. 60)

"It so affected this man that it brought about a complete deterioration of him." (A. 64)

The defendant:

"I do not know if I knew at that time April 15, 1961, that my tax returns had to be filed. I don't know if I thought about it. I don't know whether I knew on April 15, 1962 that my 1961 return was due to be filed. To a great extent I was not aware of any of my responsibilities. * * * *

"'During the years 1959 through 1963, Mr. Gorman did you know right from wrong?

"'A. In many respects I don't believe that I did.'" (A. 69-70)

"I believe I was aware of my mental incompetence during this period. (A. 72)

"I was receiving the general psychiatric treatment that he was following at that time." (A. 78)

"I think I had a fairly extensive knowledge of federal income tax and income taxation law during the years 1959 through 1963. Having this fairly extensive knowledge I still neglected my obligation to file. I believe that my failure to file was due to my state of mind during that period of time." (A. 81)

The Psychiatrist witness:

"Q. Now, the question was, Doctor, whether you have an opinion as to whether there was any distinct psychiatric diagnostic entity present.

"A. Yes, I do.

"Q. What is that?

"A. There is present in this set of facts *the basic elements for a diagnosis of a psychoneurotic reaction, depressive type.*

"Q. Can you state the basis of your opinion?

"A. Yes. These facts as you have given them show a great number of circumstances. The particular pattern of behavior that you have outlined is a very classical form of what is known as a depressive equivalent and the personality pattern prior to the onset of the symptoms as you have described them are, again, classically suggestive of the type of personality

who becomes involved in a reactive depression." (A. 121)

"Individuals who are possessed of what is technically called a rigid super ego and who have concerned themselves greatly with this type of operation in order to gain love, when they are confronted with an environmental situation of this kind where they feel betrayed and rejected, where they feel that their values do not work become *confused and helpless,* and, typically, they go into this type of depressive reaction where a defense mechanism, which we call a reaction formation, sets in. They swing to the polar type of conduct: They take on the *attitude of life is useless,* nothing counts, *what is the point of adhering to all of these codes and moral standards that I* have thought important. They obviously do not work in this world. I have been wronged. I have been confused. I have been in error. Nothing is of importance any more. Nothing counts. In short, they give up.

"Now, this particular set of circumstances, there is an additional problem of a feedback situation.

"Among the *responses that the organism gives in a depression, there are psychosomatic problems, particularly a frequent occurrence of high blood pressure or hypertension,* as has been described in your question to me.

"Now, apparently this rose to extremely high limits; the figure of 260 over 120 is so serious that an impending fatality might be expected.

"A diagnosis was made, as I understand it, of hypertensive encephelopathy. This means in plain talk that *the brain was temporarily damaged by the hypertension, by the high blood pressure.*

"Now, a damaged brain, an organic brain syndrome, has certain characteristic findings. One of them is an *emotional instability.* This is a cardinal feature of an organic brain syndrome such as an intensive, a hypertensive encephelopathy." (A. 122-123) (Emphasis Ours)

REASONS FOR GRANTING THE WRIT

1. This case presents the important question of what constitutes mental incapacity at law. The question has been considered by all Circuits, and the Circuits are in a state of flux. This question has not been, but should be, ruled on by this Court as was so strongly urged by the Fifth Circuit in the dissenting opinions filed in *Carter* v. *United States,* 325 F. 2d 697.

2. This case presents an important question of Constitutional law, as here the Court of Appeals for the Seventh Circuit approved the refusal of the trial court to charge the jury on the petitioner's sole theory of defense. Such approval is unique (See *Salley* v. *United States,* C.A.D.C., 353 F. 2d 897; *Levine* v. *United States,* C.A.D.C., 261 F. 2d 747; *Strauss* v. *United States,* 5 Cir., 376 F. 2d 416), and constitutes a sanction of such a departure from the accepted and usual course of judicial proceedings as to call for this court's power of supervision.

3. In justifying the refusal of the requested charge, the Court of Appeals reassessed and reevaluated what the trial court had characterized as "some considerable evidence relating to the defendant's mental condition," and concluded *de novo* that the issue of mental incapacity had not been raised by "some evidence." The ultimate result of the reassessment was the approval of the removal of an issue from the trial and on that issue a deprivation of jury trial. In approving the withdrawal of an issue from the jury, the decision herein conflicts with the Fifth Circuit in *Strauss* v. *United States,* 376 F. 2d 416 and in *Bryan* v. *United States,* 373 F. 2d 403.

4. The issue of mental incapacity to commit the crimes charged, as raised by the defense, cast an affirmative burden upon the government of proof beyond a

reasonable doubt of the necessary mental capacity. To relieve the government of that burden strikes at the most basic concepts of criminal law and is in conflict with the decisions of the District of Columbia Circuit in *Tatum* v. *United States,* 190 F. 2d 612; in *Jones* v. *United States,* 284 F. 2d 245; and in *Durham* v. *United States,* 214 F. 2d 862; and even with the Seventh Circuit in *United States* v. *Westerhausen,* 283 F. 2d 844.

5. This case presents a vital question relating to venue in criminal cases involving failure to file returns and requires a determination of whether the Executive has omitted to comply with the direction of the Legislature that it establish Internal Revenue Collection Districts, and whether the Judiciary has exceeded its constitutional powers in fulfilling the omission by its decision.

I.

As noted hereinbefore the defense requested the trial court charge the jury in accordance with the definition of mental responsibility found in the Modern Penal Code, as adopted by the American Law Institute (ALI) as follows:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

This definition has received acceptance in some of the various Circuits, but confusion and inconsistency still exists among the several circuits and even within them.

The petitioner believes that the following currently sets forth the respective approaches of the several Federal Courts of Appeals to this issue:

District of Columbia Circuit. The *McDonald-Durham* Rule, as initially pronounced for the Circuit in *Durham* v. *United States,* 214 F. 2d 862 (1954);

First Circuit, no authoritative decision;

Second Circuit, The American Law Institute proposal as embodied in paragraph 4.01 of its model penal code. *United States* v. *Freeman,* 357 F.2d 606 (1966).

Third Circuit, a modification of the American Law Institute proposal. *United States* v. *Currens,* 290 F.2d 751 (1961).

Fourth Circuit. Apparently a modification of the American Law Institute proposal, *United States* v. *Chandler* (not yet reported) April 4, 1968. Prior to this decision, there appeared to be no definitive decision although there were "right and wrong" references in *Hall* v. *United States,* 295 F.2d 26 (1961).

Fifth Circuit. Apparently a McNaghten variation. *Howard* v. *United States,* 232 F.2d 274. In *Carter* v. *United States,* 325 F.2d 697 in an *en banc* hearing, the Court split without any authoritative holding.

Sixth Circuit. McNaghten and irresistible impulse. *Power* v. *United States,* 282 F.2d 450 (1960).

Seventh Circuit. American Law Institute proposal after August, 1967. *United States* v. *Shapiro,* 383 F.2d 680.

Eighth Circuit. A modification of the American Law Institute proposal. *Pope* v. *United States,* 372 F.2d 710. However, this circuit still has leanings toward *Davis* v. *United States,* 160 U.S. 469 (*Pope* v. *United States,* supra.)

Ninth Circuit. Evidently at the present time, McNaghten and irresistible impulse. *Anderson* v. *United States,* 237 F.2d 118 (1956).

Tenth Circuit. Perhaps a broad approach but similar to the Eighth Circuit. What is essentially the *Davis* charge was approved in *Coffman* v. *United States,* 290 F.2d 219 (1961).

In this case, the trial court apparently hewed to the McNaghten standard of the difference between right-and-wrong test. When the ALI instruction was tendered, the trial court rejected it saying:

> "The Court: And furthermore your own expert said that he did know the difference between right and wrong and I don't think that this instruction applies. Here we have already told them that they may consider the question of his mental disease or defect* in connection with the question of wilfulness, I mean, you are certainly entitled to that kind of instruction but not to an insanity instruction. 'E' is refused." (App. 131)

Apparently, though not clearly expressed in the opinion, the Court of Appeals for the Seventh Circuit, while giving lip-service to the prospective application of the ALI instruction, also applied the antiquated and obsolete McNaghten rule. In the light of the evidence adduced as stated hereinbefore, it may be difficult to reconcile the Court's opinion that "Our review of the record fails to reveal any such proof [of insanity]." In the context of the record, it becomes clear that McNaghten was applied. In holding there was no such defense, the Court of Appeals said:

> "During the cross-examination of Gorman, the prosecutor attempted to examine on the *issue of insanity,* but the defendant successfully objected that *such an issue* was irrelevant because 'We are only going to his state of mind.'" (Op. 16018, A. 3a, our emphasis)

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* No instruction relating to mental disease or defect was given.

This statement as applied to the record makes it clear McNaghten was applied.

"Q. During the years 1959 through 1963, Mr. Gorman, did you know right from wrong?

"A. In many respects I don't believe that I did.

"Q. Did you know that it was wrong to kill?

"Miss Lavin: Object, your Honor. We have no such contention, we have not made any such contention here.

"We are getting into the McNaghton case.

"The Court: Objection sustained.

"By Mr. Schultz:

"Q. Were you able to choose between right and wrong when you knew right and wrong?

"Miss Lavin: Objection, Your Honor. Same objection.

"We are not making any plea here with respect to the McNaghton case. We are only going to his state of mind.

"The Court: Objection sustained." (A. 69-70)

We believe the right-and-wrong test to establish insanity, as applied here, is long obsolete.** For the guidance of both courts and litigants, in the interest of justice and fair trial of this important and ever-recurring defense, a definitive standard to be applied should be pronounced.

II.

As noted hereinbefore, the trial court refused upon request to define criminal irresponsibility caused by mental disease or defect or by the want of capacity to conform conduct to legal requirements.

No instruction at all was given to define to the jury the thrust or theory of the defense, and the legal aspect from which it should be viewed.

** The timeliness of this precise question is pointed up in the American Bar Association Journal, Vol. 54, June, 1968, Page 566, and especially at Page 568, where Dr. Dia-

Instead, not only was the theory of defense rejected by the Courts below, its thrust, under the instructions given, became a confession of legal culpability. The Court instructed the jury:

> "The defendant's conduct would not be wilful if he acted through negligence, inadvertence, mistake or due to his good faith misunderstanding of the requirements of the law. But I instruct you that the only wrongful purpose or motive which is necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed.
>
> • • •
>
> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963." (A. 140-141)

It is beyond cavil that a defendant is clearly entitled to an instruction on his theory of defense. The most the trial court did—as approved by the Court of Appeals—was to tell the jury to "consider" or think about this petitioner's mental condition, but no guide was given as to the standards to be applied in that consideration.

** (Continued)
mond, author of Criminal Responsibility and the Mentally Ill, asserts that only perjury on the part of a psychiatrist and satisfy the literal defense of the M'Naughton Rule in that every defendant, no matter how mentally ill, no matter how advanced his psychosis, knows the difference between right and wrong.

The foregoing instruction has been reproduced in the opinion, and stands as a proper standard for weighing evidence of mental incapacity. Backed by no authority other than this opinion, it is binding on the many courts of this Circuit when confronted by extensive evidence of what the court below defines as "emotional stress." Its approval invites error, and the instruction—now endorsed and sanctioned—should not stand as a standard to the end that mental instability is eradicated as a defense.

This decision refutes the fundamental constitutional right of a defendant to have a jury consider his defense under a defined guide as to its legal impact. The refusal to instruct on a theory of defense—especially on this most common of defenses—is the equivalent of no trial at all, and conviction may as well be had on a grand jury presentation.

III.

Though the trial court recognized that the defense was composed of "some considerable evidence relating to the defendant's . . . mental condition," the Court of Appeals re-evaluated the evidence and concluded the "insanity" issue had not been raised by "some evidence." In the light of the extensive evidence, the decision strikes mental instability as a defense in this Circuit.

Even the harshly diluted statement of the evidence in this case, as reflected by the opinion, still portrays a man suffering from "mental stress", a "psychoneurotic reaction depressive type", "a psychological disturbance, amounting to something more than worry, but something less than insanity", and "emotional stress . . . intensified." (A. 1a-3a)

The evaluation of other courts on what constitutes "some evidence" sufficient to raise the issue of mental instability differs grossly from this decision.

In *Tatum* v. *United States,* 190 F. 2d 612, D.C. Circuit, the only evidence was testimony that the defendant "didn't act normal" and that he seemed "more or less in a trance". The defense in that case was that the defendant "remembered nothing". This case was reversed and remanded. The critical aspect of this case is found in the following:

> "In view of these authorities, it seems clear to us that sanity is an 'essential' issue which, if actually litigated—that is, if 'some proof is adduced' tending to support the defense—must be submitted to the jury under the guidance of instructions.
>
> *"We are aware, of course, that any attempt to formulate a quantitative measure of the amount of evidence necessary to raise an issue can produce no more than an illusory definiteness.* But if some such measure is to be attempted, we think the best approach is that expressed by us in Kinard v. United States, a prosecution for murder in which the trial judge had not submitted the issue of manslaughter to the jury. We said there that 'The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was *some evidence relevant to the issue* of manslaughter, the credibility and force of such evidence must be for the jury, and *cannot be matter of law* for the decision of the court.' " [Emphasis supplied.]
>
> "We think *it would be incorrect to infer* from the language in Holloway v. United States *that the 'evidence sufficient to create a reasonable doubt' test is to govern* for the purpose of determining when an instruction should be given. The reference in that case was addressed to the nature of the instruction rather than to the state of the evidence making it 'essential' that it be given. A rule that an instruction should be given only when an accused presented evi-

dence 'sufficient to create a reasonable doubt' would tend to give the presumption of sanity greater effect than appears to have been intended in the Davis case, relied upon in Holloway. The result might be to remove the question of sanity from the jury despite the fact that 'some proof is adduced' in support of the defense, and even though the jury is at liberty to reject the opinion evidence of prosecution experts —to believe and disbelieve witnesses, including the accused, as it wishes.

"In sum, the function of the trial court in regard to the issue of sanity is to determine whether that issue is brought into the case by evidence. If it is, then it should be submitted to the jury with instructions that if the jury has a reasonable doubt of the defendant's sanity, there must be an acquittal."

• • •

"We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for 'in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.'" *Tatum* v. *U.S.*, 190 F.2d 612, 615-617 (our emphasis)

In *Hall* v. *United States*, 295 F.2d 26 (C.A. 4), the *Tatum* case is cited with approval as also is *Lee* v. *United States*, 91 F.2d 326 (C.A. 5). Judge Soboloff reviewed the measure of evidence in the following words:

"*No quantitative measure is prescribed anywhere, nor could one be formulated, that would enable a trial judge to determine precisely and automatically how much evidence is sufficient to raise an issue as to sanity of the accused.* Perhaps our best approach to the inquiry whether the evidence was sufficient in this case to require submission of the issue to the jury,

would be to consider a few of the decided cases dealing with similar questions and see what was there deemed sufficient. In Tatum v. United States, 1951, 88 U.S.App.D.C. 386, 190 F.2d 612, 616, decided by the Court of Appeals for the District of Columbia Circuit three years before Dunham v. United States, 1954, 94 U.S.App.D.C. 132, 214 F.2d 862, 45 A.L.R.2d 1430, the defendant was on trial for rape of a nine year old child. The only evidence raising any doubt as to his sanity was a lapse of memory claimed by the defendant, a statement by a deputy coroner that when brought before him the day after the crime 'the man appeared to me to be in more or less of a trance,' and the testimony of a police officer that the defendant's appearance was 'abnormal.' The only psychiatric testimony was that of two experts, both of whom expressed the opinion that the appellant was of sound mind. Even his court-appointed lawyer, hoping to avert a capital sentence at the hands of the jury, made a concession of the client's guilt in his summation to the jury. On appeal the only points raised were first, whether the jury improperly exercised its statutory authority to sentence the defendant to death, and second, whether there was error in the trial court's refusal to grant a continuance as requested in order to produce an additional witness. Nevertheless, the Court of Appeals *sua sponte* held that enough evidence had been introduced to raise an issue as to sanity which should have been submitted to the jury under the guidance of instructions by the court. Basing its action on the Davis case, the court stated:

> 'In view of these authorities, it seems clear to us that sanity is an "essential" issue which, if actually litigated—that is, if "some proof is adduced" tending to support the defense—must be submitted to the jury under the guidance of instructions.' 190 F.2d at page 615.

"The District of Columbia Circuit is not alone in the view that even under the traditional right and wrong test of criminal responsibility, only slight evi-

dence will suffice to overcome the presumption of sanity and create an issue for the jury. The Fifth Circuit in Lee v. United States, 1937, 91 F.2d 326, at pages 330-331, certiorari denied 302 U.S. 745, 58 S.Ct. 263, 82 L.Ed. 576, has held that:

> 'While an accused is presumed to be sane, the presumption is rebuttable and only *slight evidence* to the contrary, admitted in the course of the trial, is sufficient to raise the issue, to be submitted to the jury, with all the other evidence, without shifting the burden of proof. Davis v. U.S., 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499.' (Emphasis supplied.)

"The evidence requisite to raise the question of sanity for the jury's determination may be slight and not such as to generate a reasonable doubt. Judge Rives, relying on the Davis case, supra, has expressed well the quantum of evidence which will suffice to create a jury question. 'To require submission of the issue of insanity, the evidence need not appear to the court sufficient even to raise a reasonable doubt of sanity, for evidence of that weight would demand acquittal.' See his dissent in Howard v. United States, 5 Cir., 229 F.2d 602, at page 606, but *on this point his view was adopted by the majority on rehearing.* Howard v. United States, 5 Cir., 1956, 232 F.2d 274. See also: Rivers v. United States, 9 Cir., 1959, 270 F.2d 435, certiorari denied 1960, 362 U.S. 920, 80 S.Ct. 674, 4 L.Ed.2d 740; Pollard v. United States, 6 Cir., 1960, 282 F.2d 450; and Fitts v. United States, 10 Cir., 1960, 284 F.2d 108."

* * *

"The testimony of Dr. Elmer Klein, the Government's psychiatric witness, as it related to Hall was that he was 'of rather limited intelligence,' although he thought that 'despite his low level of intelligence he did know right from wrong.'

"A jury issue is thus presented notwithstanding one expert's opinion that Hall had the ability to distinguish between right and wrong, especially when the

other expert testified that this defendant, who was described as a 'moron' (intellectual age 7 to 9, emotional age 5 to 8) possessed a diminished capacity, 'far below the average,' to make such distinction. *It is for the jury to make its own judgment upon the facts,* and it is within its province to agree or disagree with the opinion of any expert. Holloway v. United States, 1945, 80 U.S.App.D.C. 3, 148 F.2d 665, certiorari denied 1948, 334 U.S. 852, 68 S.Ct. 1507, 92 L.Ed. 1774; United States v. Gundelfinger, D.C. W.D.Pa. 1952, 102 F.Supp. 177; 7 Wigmore, Evidence, § 1920, § 1921, § 1937 (1940 ed.); Weihofen, Insanity as a Defense in Criminal Law, (1933) page 222.

"We must therefore conclude that the initial presumption of sanity was dislodged by the testimony, thus creating an issue for the jury.

"Reversed and Remanded for a New Trial." *Hall* v. *United States,* 295 F.2d 26, 28-30 (our emphasis).

See particularly *Howard* v. *United States,* 5 Cir., 232 F. 2d 274, cited in *Hall* where, in reversing on rehearing en banc, the majority in applying the "proper test of criminal responsibility" defined it as follows:

"Only slight evidence of insanity of a defendant at the time of commission of the act is required to raise the issue for submission to the jury.

"We think, however, that the district court imposed upon the defendant too heavy a burden when it charged that the presumption of sanity continues 'until the contrary is shown by proof,' and again, 'until he is proven to be insane.'

* * *

"The district court further erred in its charge in requiring the defendant to adduce proof *both* that he did not know the difference between right and wrong *and* that he was unable to refrain from doing wrong. Either condition existing at the time of the commis-

sion of the act and as the result of some mental defect or disease was sufficient to make the defendant not guilty." *Howard* v. *United States,* 5 Cir., 232 F. 2d 274, 276.

In the petitioner's case, however, we have not only the testimony that he was undergoing psychiatric treatment by Dr. Madden, who at the time of trial was deceased, that he was hospitalized at Sacred Heart Sanitarium in Milwaukee, Wisconsin, that his behavior was such that it demonstrated emotional distress but the defense also had the testimony of Dr. Zyporin as above indicated. Even the Government conceded on final argument that "something was wrong".

> "Now, the government is not contending, and we have never contended, that the defendant, Mr. Gorman, was a strong 100 per cent healthy he-man during this period. We are not alleging that. We don't contend it. It is not true. He was not. Obviously there was something wrong. Something wrong. Well, something wrong? Everyone of us in our lifetime have something wrong at one time or another.
>
> "His gross income fell, it fell from a substantial amount in 1959 to $10,875 gross income in 1962. Then it went back up to over $40,000 in 1963. In 1960 it was $23,000. Gross income. $23,000 gross income. It fell and it went back up. Yes, obviously, there was something wrong.
>
> "But we are not saying that there was nothing wrong. He went to the Sacred Heart Sanitarium. He wants you to believe that the Sacred Heart Sanitarium was an insane asylum. But his mother was there, too. Remember he said that he had been there many times. His mother was there. It is not an insane asylum." (App. 131-132)

Similarly, in the cases where the ALI instruction was approved as appropriately given or to be given, the facts recited would, by comparison with the facts in this case, compel a conclusion directly opposite to that reached here.

In *United States* v. *Freedman,* 2 Cir., 257 F.2d 606, the irresponsibility stemmed from drug and liquor addiction leading to an inability to know what one is doing and where one is. However, the testimony was that the defendant had an awareness of what he was doing as to the events charged, but he was unaware of implications to the nature and meaning of what he was doing. (357 F.2d at 609-612) In like matter, *United States* v. *Malafronte,* 2 Cir., involved chronic alcoholism, which according to the testimony caused damage to the brain cells "leading to difficulty in making moral judgments and an inability to understand the significance of his acts." (357 F.2d at 630) In *Pope* v. *United States,* 8 Cir., 372 F.2d 710, the defense of irresponsibility centered on the contention by the defendant that he had absolutely no motive or reason for the commission of the crime, from which single fact it was opined that he was suffering from a schizophrenic reaction (372 F.2d 719). In *United States* v. *Currens,* 3 Cir., 290 F.2d 751, the evidence was that the defendant, a person of above average intelligence, ordinarily affable, was subject to occasionable explosive and irrationable courses of conduct. It was testified that he knew the difference between right and wrong but would not adhere to the right. The psychiatrist testifying would not say that he was subject to irresistible impulses, but rather that he reacted without due regard for consequences and that his illegal and anti-social conduct was repetitive and an outgrowth of his type of personality and as such, he could not be considered a mentally healthy person. The evidence continued:

"The Doctor also said that Currens was not *'insane'* in the sense that that legal, non-medical, term is employed, that the term 'sociopathic personality' is not a term precisely indicating a mental illness but that it does have 'mental implications'. He stated also that: 'It is a very fine line, as I pointed out before, between the psychopathic type of personality, and a true mental psychotic personality.', and that *'We do not use the word "sane" or "insane" in medicine.'* Dr. Bowers would not say that Currens was schizophrenic but indicated that he might be schizoid and that he had symptoms, as shown by 'the schizophrenia tendency'. He stated, nonetheless that the schizoid personality and the sociopathic personality are closely related." *United States* v. *Currens*, 3 Cir., 290 F.2d 751, 756. (our emphasis)

In the light of these authorities—all overwhelmingly consistent with the arguments of the petitioner and none inconsistent—reconciliation with the decision in this case is impossible. If it suffices simply to say that no case was made out (relying as the court below does, entirely on those aspects of the testimony that make the issues uncertain and thus a jury question) the guarantee of trial by jury is effectively destroyed.

The Court of Appeals, notwithstanding the recognition of a defense by the prosecution, and notwithstanding that the trial court described the defense as "some considerable evidence relating to defendant's . . . mental condition", re-evaluated the evidence and concluded there was none. We submit that the *de novo* re-evaluation not only conflicts with all established authority, but exceeds appellate jurisdiction. Assessment of the value and worth of evidence is confined exclusively to a jury properly instructed and is beyond the domain of any Court.

IV.

The court's attention is respectfully directed to *Tatum* v. *United States,* 190 F.2d 612 where the Court stated at page 615:

> "When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people, including those accused of crime, are sane. But as soon as "some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt." That is the rule followed by the Supreme Court and by this court. The leading authority on the subject is *Davis* v. *United States,* where the Supreme Court said 'Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime.'" *Tatum* v. *United States,* 190 F.2d 612, 615.

It is generally accepted that when a lack of mental capacity is raised as a defense to a charge of a crime, the law presumes that the defendant is sane, but as soon as some evidence of mental disorder is introduced, sanity must be proven beyond a reasonable doubt as a part of the prosecution's case. In this respect see the following cases: *Jones* v. *United States,* 284 F.2d 245; *Durham* v. *United States,* 214 F.2d 862; *United States* v. *Westerhausen,* 283 F.2d 844.

In the case at bar the petitioner by his testimony and by the expert witness Zyporin, raised the question of sanity. No effort was made by the government to overcome this testimony. It is the respectful submission of this petitioner that the court under the circumstances should have granted the motion for judgment of acquittal,

for the reason that the government had not met its burden as to each and every element of the offenses charged, and particularly as to his capacity to commit the crimes.

Relieving the government of its burden of proof on the charges it brought against the petitioner strikes at the heart of the requirements of criminal law. Its discouragement must be incisive.

V.

Article 3, Section 2, Clause 3 of the United States Constitution requires that criminal trials shall be held in the State where the said crime shall have been committed; or when not committed within any State, at such place as the Congress may by law, have directed. The Sixth Amendment to the Constitution of the United States secures to an accused the right to a trial by an impartial jury of the State's and District wherein the crime shall have been committed, which District shall have been previously ascertained by law. The United States Supreme Court in *United States* v. *Johnson,* 322 U.S. 273 defined questions of venue in criminal cases as, not merely matters of formal legal procedure, but as raising deep issues of public policy in the light of which legislation must be construed. (323 U.S. at 276)

The indictment, and each count thereof, charges in substance that the petitioner was a resident of the Northern District of Illinois, and that he was required by law to file tax returns with the District Director of Internal Revenue for the *Chicago Internal Revenue District at Chicago, Illinois,* and that he wilfully failed to do so. On its face, the indictment appears to correctly charge venue. The proof at trial showed that he was a resident either of Oak Park or Chicago, Illinois, and he had his principal

place of business in Chicago, Illinois. The question of whether or not that establishes venue depends on whether the crime charged occurred at the place of the Chicago Internal Revenue District Office. This in turn depends on whether the law requires residents of Oak Park and Chicago, Illinois, to file returns in the Chicago Office of the Internal Revenue District.

The venue of a federal offense committed solely by an accused's failure to perform a statutory duty is determined by the general rule that where the crime charged is a failure to do a regularly required act, the place fixed for its performance, fixed the situs of the crime. This is true even if the result is that trial occurs in a District remote from the District of the accused's residence. *United States* v. *Anderson,* 328 U.S. 699; *Johnston* v. *United States,* 351 U.S. 215; *United States* v. *Lombardo,* 241 U.S. 73; *Rumely* v. *McCarthy,* 250 U.S. 283; *New York C & H RR. Co.* v. *United States,* 2 Cir., 166 F. 267.

It is thus clear that the Northern District of Illinois is the correct place of venue only if the law requires petitioner to file his returns in Chicago, Illinois.

Title 26, United States Code, Section 6091, provides that income tax returns of individuals "shall be made to the secretary or his delegate in the Internal Revenue District in which is located the legal residence or principal place of business of the person making the return, * * *." Regulation 1.6091-2 is to the same effect. It therefore becomes important to determine whether petitioner's residence and place of business, to wit, Oak Park, Illinois, lies within the geographical boundaries of the Chicago Internal Revenue District.

In enacting the Internal Revenue Code of 1954 Congress provided that the President of the United States

should establish Internal Revenue Districts and their boundaries. Title 26, United States Code, Section 7621, Internal Revenue Code of 1954, reads:

> "§7621. Internal revenue districts.
>
> "(a) Establishment and alteration. The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The president may from time to time alter such districts.
>
> "(b) Boundaries. For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite two or more States or Territories into one district."

The detailed discussion in the house reports concerning the aforementioned section of the Code reads as follows:

> §7621. Internal revenue districts.
>
> "This section corresponds to section 3650 of the 1939 code, but the special provisions of existing law which relate to the Territory of Hawaii and which further provide that States may be subdivided or may be united into 1 district (but 1 district cannot include part of 2 different States) have been eliminated as unnecessary detail for the reason that internal revenue districts now are merely established for internal administrative convenience." *United States Code Congressional and Administrative News*, 83rd Congress, 2nd Session, 1954, page 4585.

The President has not exercised the authority delegated to him by Congress in Section 7621 of the Internal Revenue Code of 1954. By executive order he has sought to delegate some responsibility to the Secretary of the Treasury. See Executive Order No. 10289, September 17, 1951, and Executive Order No. 10574, November 5, 1954.

The opinion of the United States Court of Appeals for the Seventh Circuit states that in making this argument petitioner ignores Section 7851(b)(2) of the Code

(26 U.S.C., §7851(b)(2)) which provides that the repeal of the Internal Revenue Code of 1939 will not affect established Internal Revenue Districts. The opinion continues saying that in 1946*** the Secretary of the Treasury divided Illinois into two collection districts, one of which is encompassed in Cook County, (The county in which Chicago and Oak Park, Illinois, are situated). In the reasoning of the United States Court of Appeals for the Seventh Circuit, it neglects to show wherein the Secretary of the Treasury had the right to establish collection districts in 1946. The establishment of districts began with President Abraham Lincoln designating (50 years before the enactment of the 16th Amendment) 13 Illinois collection districts for supporting the government in paying interest on the public debt. So far as we are advised, it was not *until 1949* that the President of the United States transferred his functions to the Secretary of the Treasury. (See 15 F.R. 4935) We are not directed to any authority under which the Secretary of the Treasury established collection districts in 1946, in order that the provisions of 26 U.S.C. 7851 would be of any legal effect, nor has, in the course of this litigation, the government directed us to the authority under which collection districts were established except in an informal way to accommodate the internal functions of the Internal Revenue Service, but without any binding effect under law on the general public.

We agree with the Court of Appeals for the Seventh Circuit that "Congress intended no such ludicrous result [that no one could be prosecuted for failure to file tax returns]." In fact Congress expressly delegated the function to the President of the United States and he, in turn, delegated it to the Secretary of the Treasury. The

*** The direction to report a collection office is not authority to create a collection district.

Treasury Department has not assumed its delegated function.

It is unfortunate if the "result" was not what Congress intended. The fact is that there is no common criminal law in the laws of the United States. The fact is that criminal statutes require strict construction, and there is no leeway for implementing good intentions, nor is there provision for the judiciary, by decision, supplementing the omission of the executive to do acts delegated by the legislative. Thus the Court of Appeals' emphasis on where petitioner lived or where was his place of business has nothing to do with where he should perform an action, the omission of which is charged as a crime. Venue is an essential element that cannot be supplied by surmise or intendment.

Venue, on the other hand, is not a necessary element in civil actions, and harsh civil penalties are provided for omission to file income tax returns. But the liberality of interpretation in this decision as it relates to criminal law and criminal penalties under the federal law is improper.

There is a growing awareness of this deficiency in the Internal Revenue Laws. It will be a recurring question —again and again relitigated—unless it is here resolved, or the Executive acts.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for the Petitioner.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

No. 16018
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RICHARD E. GORMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 5, 1968

Before CASTLE, FAIRCHILD and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* A jury found defendant guilty of failing to file federal income tax returns with the District Director of Internal Revenue in Chicago, Illinois, in the years 1959-1963, inclusive, in violation of Section 7203 of the Internal Revenue Code (26 U.S.C. § 7203). Sentences totaling three years were imposed under the five counts of the indictment.

The evidence showed that although defendant filed income tax returns for the years 1954 through 1958, he failed to do so for the five ensuing years.

During the summer of 1959 defendant was accused of subornation of a juror in the January 1959 criminal trial of his client, Gerald Covelli. Gorman's defense in

this action was that the resulting mental stress caused him to neglect filing the tax returns in question. His indictment for subornation of a juror occurred in June 1960. He was acquitted of that offense in December 1962.

In response to a hypothetical question, psychiatrist Dr. Marvin Ziporyn testified that defendant had "a psychoneurotic reaction, depressive type," but that his ability to reason logically was unimpaired. Dr. Ziporyn also testified that such a psychoneurotic "is aware of reality," and that defendant "knew right from wrong" and was not psychotic. He described Gorman's condition as "not uncommon."

Defendant's principal argument is that the District Court erroneously refused to give the following insanity instruction:

> "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

When applicable, such an instruction is to be given in this Circuit in trials commenced after August 1967.[1] However, a defendant must introduce some evidence of insanity before he is entitled to any insanity instruction. *Tatum* v. *United States,* 190 F.2d 612 (D.C. Cir. 1951); *Smith* v. *United States,* 272 F.2d 547, 548 (D.C. Cir. 1959); *Hall* v. *United States,* 295 F.2d 26 (4th Cir. 1961). Our review of this record fails to reveal any such proof, so that an insanity instruction was properly denied. Idiosyncratic behavior and irresponsibility are insufficient to warrant such an instruction. *Smith* v. *United States,* 272 F.2d 547 (D.C. Cir. 1959); *Smith* v. *United States,*

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[1] *United States* v. *Shapiro,* 383 F.2d 680, 687 (7th Cir. 1967). The present trial occurred in September 1966. The history of insanity instructions in this Circuit is contained in *Shapiro* and *United States* v. *Williams,* 372 F.2d 76 (7th Cir. 1967), certiorari denied, 389 U.S. 880.

353 F.2d 838 (D.C. Cir. 1965), certiorari denied, 384 U.S. 974. In reality, defendant's theory advanced to justify acquittal was lack of willfulness. Such a theory is frequently used in failure to file tax return cases, as distinct from an insanity defense. As Justice Jackson observed in *Spies* v. *United States,* 317 U.S. 492, 493, "Petitioner's testimony related to * * * lack of willfulness in his defaults, chiefly because of a psychological disturbance, amounting to something more than worry but something less than insanity." Here too lack of willfulness, not insanity, was Gorman's theory.

It is true that defendant did portray his emotional stress, apparently intensified by the subornation of perjury charge, but no evidence was introduced to show that he was insane during these five years. The District Court took account of Gorman's mental condition in instructing the jury as follows;

> "Now, you have heard some considerable evidence in this case introduced relating to the defendant's mental and physical condition. Such testimony was introduced or permitted in this trial solely for one purpose and one purpose only and that purpose is so that you may consider whether or not the defendant's mental and physical condition caused the defendant to inadvertently or negligently fail to make his income tax returns for the years 1959 through 1963."

That instruction properly told the jury to consider defendant's "mental condition" before rendering its verdict. It was then for the jury to decide whether the evidence of Gorman's mental condition merited acquittal. Kalven & Zeisel, *The American Jury* (1966) pp. 301-305.

During the cross-examination of Gorman, the prosecutor attempted to examine on the issue of insanity, but the defendant successfully objected that such an issue was irrelevant because "We are only going to the state of mind." Likewise, Gorman's counsel's opening and closing statements did not advance the defense of

insanity. A search of the record indicates that this defense was never presented, perhaps because of defendant's expert witness' testimony that Gorman was not psychotic. Since Gorman never tendered the issue of insanity, it was unnecessary for the Government to prove his sanity beyond a reasonable doubt. *Smith* v. *United States,* 353 F.2d 838, 843 (D.C. Cir. 1965), certiorari denied, 384 U.S. 974.

Because of the absence of evidence of insanity and because the defendant objected to any insanity inquiry by the Government, the District Court was justified in concluding that said defense had not been raised. Therefore, the insanity instruction was properly refused.

Gorman also argues that the District Court improperly refused to receive proffered testimony (1) of United States District Judge Perry, who presided at the Gerald Covelli trial and testified for Gorman in his ensuing subornation trial and (2) of George Callaghan, counsel for Gorman's co-defendant in the subornation case, concerning the perjurious character of Covelli. Gorman sought to introduce such testimony to show his lack of willful intent to omit filing his income tax returns during these five years. It would tend to show that Gorman was innocent of the subornation offense, but this had already been shown by Gorman's testimony that he was acquitted in December 1962. The fact that Judge Perry testified for Gorman in his subornation trial and agreed with the acquittal verdict would not show that the indictment had a deleterious effect on Gorman, nor would Callaghan's testimony that Covelli was a self-confessed perjurer. Furthermore, the jury had already heard Gorman's testimony that Covelli had testified in a Texas trial that he would commit perjury to avoid trouble.

We agree that the District Court could properly conclude that the offered testimony had insufficient probative value to be admitted. It was of course the trial court's duty to exclude remote evidence. *United States* v. *Maryland & Virginia Milk Producers Association,* 20 F.R.D.

441, 442 (D. D.C. 1957). As noted in McCormick on Evidence § 152, three factors justifying exclusion of evidence are: danger of jury prejudice, danger of jury distraction by creation of side issues, and consumption of undue amounts of trial time. All these factors were present here. Juror Laux was personally acquainted with Judge Perry and could have been prejudiced by Judge Perry's appearance as a witness. A retrial of the suborning perjury charges would certainly be a confusing side issue. It would also consume unnecessary time. In our view, the District Court's action in excluding this evidence was well within its power to keep out remote evidence. *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 710.

Relying on *Carter* v. *United States*, 373 F.2d 911, (9th Cir. 1967), *Young* v. *United States*, 346 F.2d 793 (D.C. Cir. 1965), and *United States* v. *Kelley*, 314 F.2d 461 (6th Cir. 1963), Gorman asserts that he was deprived of the effective assistance of counsel because the District Court threatened his lawyers with contempt. In *Carter*, the conviction was affirmed. In both *Young* and *Kelley*, the prejudicial effect on the jury of the trial judges' remarks occasioned the reversals, but here the warning was given outside the presence of the jury. Moreover, in *Kelley* the trial court had incorrectly limited defense counsel's cross-examination, whereas here defense counsel persisted in attempting to bring before the jury evidence that the District Court had already properly ruled to be inadmissible. It was entirely appropriate for the District Judge to warn Gorman's lawyers of the consequences of their persistence in attempting to prejudice the jury by showing that Judge Perry had appeared as a witness for Gorman in his subornation trial. *United States* v. *Bolden*, 355 F.2d 453, 457 (7th Cir. 1965), certiorari denied, 384 U.S. 1012.[2]

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[2] Defendant's attack on three other rulings of the District Court in no way shows that he was deprived of effective assistance of counsel and merits no discussion.

Gorman was not permitted to introduce certain of his cancelled 1959-1963 checks, one series of which was payable to the order of cash and the other series payable to the order of specific payees. These were offered to show his business expenses. Under the statute (26 U.S.C. § 7203), the Government had to show that defendant was required to file a return, that he did not do so, and that his failure to file was willful. *Yarborough* v. *United States,* 230 F.2d 56, 61 (4th Cir. 1956), certiorari denied, 351 U.S. 969. The Government was not required to prove that Gorman owed the Government any tax.

If Gorman had offered evidence that his failure to file was not willful because only a minimal tax was due, the checks would have been admissible. *Cf. Womack* v. *United States,* 336 F.2d 959 (D.C. Cir. 1964). However, he testified that he was knowledgeable in the field of tax law and knew he was obligated to file a tax return if he had gross income in excess of $600, whether or not any tax was due. Therefore, proof that he owed a minimal tax was not relevant. See *Silverstein* v. *United States,* 377 F.2d 269, 270-271 (1st Cir. 1967).

To support the admissibility of the checks, defendant relies on *Lumetta* v. *United States,* 362 F.2d 644 (8th Cir. 1966). There the Government was permitted to show the corporate income of Stephens Cement Contractors, Inc., of which Lumetta was president, to show "that Stephens was a going concern dealing in substantial amounts of money and operating at a profit; and that had Lumetta filed a return [for Stephens] it would have shown a tax owing to the government." 362 F.2d at pp. 645-646. The evidence was admitted to combat the "defenses interposed," one probably being that no tax was due. 362 F.2d at p. 646. Here the testimony shows that the amount of tax owing was not the reason Gorman did not file his tax returns, so that proof of tax liability was irrelevant.

Defendant also complains that it was unfair to receive testimony from a bookkeeper as to the amount of his

paid office rent. Since defense counsel elicited the amounts of the annual payments from this witness, Gorman can hardly object to their receipt. Furthermore, there were no suggestions to the jury that these were Gorman's only deductible expenses.

Defendant's principal brief complains of the phrase "in order to prevent the government from knowing the extent of his tax liability" in the willfulness instruction given.[3] Because this phrase was added by the District Court at the suggestion of Gorman, he cannot now complain of its inclusion. *United States* v. *Echeles,* 222 F.2d 144, 152 (7th Cir. 1956), certiorari denied, 350 U.S. 828. Similarly, he cannot in his reply brief raise the deletion of "without justifiable excuse" from the same instruction. See Rule 17(a) of this Court.

Defendant's final point, first asserted in his post-trial motion for acquittal, is that there was no venue in the Northern District of Illinois. Defendant's residence was either in Chicago or suburban Oak Park, Illinois, and his place of business was in Chicago. Therefore, there was venue below if his returns had to be filed with the District Director of the Internal Revenue District in Chicago.

Section 6091 of the Internal Revenue Code of 1954 (26 U.S.C. § 6091) requires individuals to file their income tax returns in the internal revenue district of their legal residence or place of business. Defendant contends that there is no venue on the ground that neither the President nor his delegate, the Secretary of the Treasury, has established any internal revenue districts under Section 7621 of said Code (26 U.S.C. § 7621), which provides:

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[3] The willfulness instruction was as follows:

"The word 'wilfully' used in connection with this offense means deliberately, intentional or with wrongful purpose of deliberately intending not to file a return which the defendant knew he should have filed in order to prevent the government from knowing the extent of his tax liability."

§ 7621. Internal revenue districts.

"(a) Establishment and alteration.—The President shall establish convenient internal revenue districts for the purpose of administering the internal revenue laws. The President may from time to time alter such districts.

"(b) Boundaries.—For the purpose mentioned in subsection (a), the President may subdivide any State, Territory, or the District of Columbia, or may unite into one district two or more States or a Territory and one or more States."

This contention ignores Section 7851 (b) (2) of the Code (26 U.S.C. § 7851 (b)(2)), which provides:

"§ 7851. Applicability of Revenue Laws.

* * *

"(b) Effect of Repeal of Internal Revenue Code of 1939.—

* * *

"(2) Existing offices.—The repeal of any provision of the Internal Revenue Code of 1939 shall not abolish, terminate, or otherwise change—

"(A) any internal revenue district." (Emphasis supplied.)

In 1946 the Secretary of the Treasury divided Illinois into two collection districts, with Cook County, in which Chicago and Oak Park are situated, in the First District (11 F.R. 177A, p. 28). Except for changes in nomenclature, Illinois has subsequently retained the same two collection districts. Inasmuch as Chicago and Oak Park are in the First Collection District (now entitled "District Director, Internal Revenue Service, Chicago, Illinois"[4]), venue was properly laid in the Northern District of Illinois. To hold otherwise would mean that no one could be prosecuted for failure to file tax returns anywhere in the United States. Congress intended no such ludicrous result.

AFFIRMED.

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[4] See 18 F.R. 3499.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Friday, April 5, 1968

Before

Hon. LATHAM CASTLE, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 16018 *vs.*

RICHARD E. GORMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, May 9, 1968

Before

Hon. JOHN S. HASTINGS, Chief Judge

Hon. ELMER J. SCHNACKENBERG, Circuit Judge

Hon. LATHAM CASTLE, Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RICHARD E. GORMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 16018	

IT IS ORDERED by the Court, En Banc, that the petition for rehearing En Banc in this cause be and the same is hereby denied.

(Judge Kiley did not participate in the vote on the petition for rehearing.)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, May 9, 1968

Before

Hon. LATHAM CASTLE, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

UNITED STATES OF AMERICA *Plaintiff-Appellee* No. 16018 *vs.* RICHARD E. GORMAN *Defendant-Appellant*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.